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00-1707

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2000

THOMAS CHARLES KLEVE, *Petitioner,*

v.

D.R. HILL, Warden CCI, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

Whether, in light of *Fiore v. White*, 531 U.S. 225 (2001), Petitioner was entitled to habeas corpus relief on the asserted ground that he had been "acquitted" of the charge of conspiracy to commit "first-degree" murder and convicted instead of a "non-existent" crime of conspiracy to commit "second-degree" murder even though the jury was properly instructed, within the context of the conspiracy to commit second-degree murder instructions, as to all the elements of the unitary offense of conspiracy to commit murder, and the prosecution offered evidence to prove every element of that offense?

TABLE OF CONTENTS

	Page
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE PETITION	6
ARGUMENT	6
I. THE COURT OF APPEALS CORRECTLY FOUND THAT PETITIONER WAS PROPERLY CONVICTED OF CONSPIRACY TO COMMIT MURDER UNDER CALIFORNIA LAW, AND THAT DECISION IS NOT INCONSISTENT WITH THIS COURT'S HOLDING IN *FIORE v. WHITE*	6
II. THE COURT OF APPEALS' RULING DOES NOT CONFLICTWITH THIS COURT'S *POWELL* DECISION	12
III. THERE IS NO CONFLICT AMONG CIRCUIT AUTHORITY	16
CONCLUSION	18

TABLE OF AUTHORITIES

Cases	Page
Adams v. Murphy, 653 F.2d 224 (5th Cir. 1981)	16, 17
Butler v. McKellar, 494 U.S. 407 (1990)	13
Estelle v. McGuire, 502 U.S. 62 (1991)	11
Fiore v. White, 531 U.S. 225 (2001)	6, 7
Greenawalt v. Ricketts, 943 F.2d 1020 (9th Cir. 1991)	13
Henderson v. Kibbe, 431 U.S. 145 (1977)	11
Jackson v. Virginia, 443 U.S. 307 (1979)	7
Kleve v. Hill, 243 F.3d 1149 (9th Cir. 2001)	6, 12, 14
Lambrix v. Singletary, 520 U.S. 518 (1997)	13
O'Dell v. Netherland, 521 U.S. 151 (1997)	12, 13

TABLE OF AUTHORITIES (continued)

	Page
Penry v. Lynaugh 492 U.S. 302 (1989)	16
People v. Amick, 20 Cal. 2d 247, 125 P.2d 25 (1942)	14
People v. Cortez, 18 Cal. 4th 1223, 960 P.2d 537, 77 Cal. Rptr. 2d 733 (1998)	7-10, 14, 15
People v. Horn, 12 Cal. 3d 290, 524 P.2d 1300, 115 Cal. Rptr. 516 (1974)	9-10
People v. Swain, 12 Cal. 4th 593, 909 P.2d 998, 49 Cal. Rptr. 2d 390 (1996)	7, 9
People v. Underwood, 181 Cal. App. 3d 1223, 226 Cal. Rptr. 840 (1986)	14
Sawyer v. Smith, 497 U.S. 227 (1990)	12
Teague v. Lane, 489 U.S. 288 (1989)	12, 13, 16
United States v. Powell, 469 U.S. 57 (1984)	12, 13

TABLE OF AUTHORITIES (continued)

	Page
United States v. Price, 750 F.2d 365 (5th Cir. 1985)	13
Statutes	
Cal. Pen. Code, § 182	8
Other Authorities	
CALJIC No. 8.69 (6th ed. 1996)	9

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STATEMENT OF THE CASE

In July 1987, Mark Hallin was arrested for selling cocaine. At that time, Hallin lived on Ramhurst Street in La Mirada, California. (RT 125-26.)[1/] Hallin had received the cocaine from a small network of drug dealers. After his arrest, Hallin agreed to cooperate with the police as an informant. (RT 126-28.)

In September 1987, one of the chief drug dealers who had been an indirect supplier to Hallin, Renee Green, arranged to have Hallin killed because he was scheduled to testify against one of her drug-dealing associates. Green feared that Hallin's testimony might implicate her. (RT 222-25.)

On September 29, 1987, at about 8 p.m., Petitioner

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1. The "RT" notation refers to the Reporter's Transcript on direct appeal in *People v. Charles Thomas Kleve*, Los Angeles County Superior Court no. A475355. This transcript was lodged with the district court.

and Clinton Calley[2/] left Petitioner's house in Riverside County to go to La Mirada, in Los Angeles County. (RT 288-91, 302-04, 306.) Petitioner and Calley lived within five miles of one another in Riverside County. (RT 212, 230-32.) Petitioner owned a pistol and was a good shot. (RT 270-71, 281, 290, 296, 298-99, 301, 303.) Petitioner and Calley arrived in the area at around 9 p.m. and began looking for an address on Ramhurst. (RT 304-05.)

At about 12:30 a.m., Deputy Andrew Garcia of the Los Angeles County Sheriff's Department stopped Petitioner's truck two blocks from Hallin's condominium on Ramhurst in La Mirada. (RT 51, 72, 84-88, 128-29.) When Deputy Garcia asked Petitioner, the driver, to step out of the truck, he saw a gun barrel sticking out from underneath Calley's oversized jacket. (RT 52, 73, 78, 88-90, 93-95, 98-99.) Calley also had an open street map on his lap. (RT 59.)

When Calley was apprehended at the scene, an explosive device was discovered in his jacket pocket. (RT 54, 56, 69-70, 79-80, 82, 100-01, 107, 169-72, 181-84, 206-07, 214.) The device was examined by the arson/explosives unit of the Los Angeles County Sheriff's Office, and it was determined to contain live dynamite that could have been detonated. (RT 71, 106-14.) It was also determined that the device fit Hallin's motorcycle and could have detonated when the motorcycle was started. (RT 115-17.)

Recovered from the pickup truck was a loaded semiautomatic weapon, a .9 millimeter pistol which had several live rounds, another magazine which had nine live rounds, and a black handled dagger in a sheath. Found on Petitioner were six live .9 millimeter rounds which fit the pistol. (RT 59-62, 64, 66-67, 82, 203-06, 209-11, 214-17.) Also recovered from Calley was a note with an address on Ramhurst Street, and physical descriptions of Hallin, Hallin's wife, and vehicle. (RT 178-79, 189, 263-67.) When given an opportunity to place a

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2. Calley worked for Green and frequently used cocaine supplied by her. (RT 218-29, 226, 228, 328-29.)

telephone call at the police station, Calley contacted Renee Green. (RT 176-77.)

In his defense at trial, Petitioner and his sister testified that they had been shooting in the hills on the afternoon of September 29 and that Petitioner's gun had been left in his truck. (RT 269-72, 290-91, 295.) Petitioner further explained that he was with Calley when they were arrested because he was helping Calley look for an apartment which Calley wanted to rent. (RT 289.) Petitioner denied entering into an agreement with Calley to kill Hallin. (RT 288, 295-97.)

The Los Angeles County District Attorney charged Petitioner and Calley jointly in an eight-count information relating to the attempted murder of Hallin. Specifically, Petitioner was charged with conspiracy to commit first degree murder (Cal. Penal Code § 182(1)),[3] with transporting a destructive device (§ 12303.6), possessing a silencer (§ 12520), carrying a loaded firearm in a vehicle while in a public place (§ 12031(a)), and driving a motor vehicle with a loaded firearm (§ 12034).[4]

There were two trials in this case. As a result of the first trial Petitioner was found guilty of carrying a loaded firearm in a public place and driving a motor vehicle with a loaded firearm. Petitioner was acquitted of possessing a silencer. The jury deadlocked on the conspiracy and transporting a destructive device counts, and the court declared a mistrial as to those counts. On retrial, Petitioner was convicted of conspiracy to commit second degree murder. The jury was unable to reach a verdict on the count of transporting a destructive device. Petitioner was sentenced to state prison for a term of fifteen years to life for conspiracy to commit second

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3. All subsequent section references are to the California Penal Code, unless specified otherwise.

4. Documents relating to Petitioner's trial and direct appeal were lodged with both the district court and the Ninth Circuit.

degree murder, and sentence was suspended on the remaining counts.[5]

An appeal was taken from the judgment. On July 18, 1991, the California Court of Appeal affirmed the judgment. The California Supreme Court denied review. Thereafter, Petitioner filed various habeas corpus petitions in both state and federal court.

On January 6, 1996, Petitioner filed his habeas corpus petition in the federal district court from which the instant Petition arises. On July 7, 1997, the district court filed its order and judgment adopting the recommendations of the magistrate judge, and dismissed the habeas petition. The court held, inter alia, that Petitioner's conviction for conspiracy to commit second degree murder was proper under California law.

On July 30, 1999, the Ninth Circuit Court of Appeals affirmed the district court's judgment denying the habeas petition. *Kleve v. Hill*, 185 F.3d 1009 (9th Cir. 1999).[6] The majority held that Petitioner's conviction for conspiracy to murder was proper under one of two theories. One theory was that California law might have evolved since the time of Petitioner's conviction, but that Petitioner was not entitled to the benefit of the evolution. Or, the other theory was that conspiracy to murder in California is not a matter of degrees, and as instructed, the jury could properly have found Petitioner guilty of that offense. On January 25, 2000, Petitioner's petition for rehearing en banc was denied. The published dissent by Judge Kozinski from the denial of rehearing en banc, filed January 25, 2000, is reported at 202 F.3d 1155 (9th Cir.

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5. In a separate proceeding, Petitioner was charged with the transportation of methamphetamine. After a court trial, Petitioner was found guilty as charged and sentenced to a concurrent three-year term.

6. In an unpublished portion of the opinion, the Court disposed of Petitioner's other substantive claims and affirmed the district court's judgment.

2000).

This Court granted certiorari and, on January 16, 2001, remanded the case to the Ninth Circuit Court of Appeals for further consideration in light of this Court's decision in *Fiore v. White*, 531 U.S. 225 (2001). On March 16, 2001, the Ninth Circuit Court of Appeals again affirmed the district court's judgment denying the habeas petition. *Kleve v. Hill*, 243 F.3d 1149 (9th Cir. 2001). The majority of the panel found that *Fiore v. White* rested on sufficiency of the evidence principles as set forth in *Jackson v. Virginia* (1997) 443 U.S. 307, and that nothing in the first *Kleve* decision was inconsistent with *Fiore*. Specifically, the Ninth Circuit ruled that two grounds supported its decision: first, although the California Supreme Court's decision in *People v. Cortez*, 18 Cal. 4th 1223, 960 P.2d 537, 77 Cal. Rptr. 2d 733 (1998) may have changed California law, a change in the law does not invalidate a conviction obtained under an earlier law; or second, even if *Cortez* did not change the law, Kleve was properly convicted under its reasoning.

REASONS FOR DENYING THE PETITION

ARGUMENT

I.

THE COURT OF APPEALS CORRECTLY FOUND THAT PETITIONER WAS PROPERLY CONVICTED OF CONSPIRACY TO COMMIT MURDER UNDER CALIFORNIA LAW, AND THAT DECISION IS NOT INCONSISTENT WITH THIS COURT'S HOLDING IN *FIORE v. WHITE*

A majority of the Ninth Circuit Court of Appeals panel considering this case found that Petitioner was properly convicted of conspiracy to murder under California law. Moreover, after the remand, the Ninth Circuit held that there was nothing in its earlier decision in this case that was inconsistent with this Court's decision in *Fiore v. White*, 531 U.S. 225 (2001). *Kleve v. Hill*, 243 F.3d 1149, 1151 (9th Cir. 2001). The Ninth Circuit's holding is correct.

In *Fiore*, the petitioner was convicted of operating a waste facility without a permit. *Fiore*, 513 U.S. at 226. Though the petitioner had a permit, the prosecution argued petitioner's conduct so exceeded the permit that he nonetheless violated the criminal statute. The Pennsylvania Supreme Court declined to hear Fiore's appeal or writ. *Id.* at 227. Later, the Pennsylvania Supreme Court ruled in the appeal of the co-defendant that the conduct did not violate the criminal statute. In a certified question from this Court, the Pennsylvania Supreme Court stated that it had not issued a new rule of law in the co-defendant's case, but rather had announced a proper interpretation of existing law. *Id.* at 228.

This Court noted that because the Pennsylvania Supreme Court's holding was merely a clarification of existing

law at the time of Fiore's conviction, there was no issue of retroactivity. *Id.* Rather, the Court's opinion rested on well-established sufficiency of the evidence principles as set forth in *Jackson v. Virginia*, 443 U.S. 307, 324 (1979).

> We have held that the Due Process Clause of the Fourteenth Amendment forbids a State to convict a person of a crime without proving the elements of that crime beyond a reasonable doubt.

Fiore, 531 U.S. at 228-29. As discussed *infra*, in contrast to the situation in *Fiore*, all of the elements of conspiracy to murder were proved by the prosecution in the instant case.

In *People v. Swain*, 12 Cal. 4th 593, 909 P.2d 998, 49 Cal. Rptr. 2d 390 (1996), the California Supreme Court concluded that a conspiracy to commit murder is necessarily a conspiracy to commit intent-to-kill (i.e., express malice) murder. 909 P.2d at 1001. The *Swain* court expressly left open, however, the question of whether conspiracy to commit specific intent-to-kill second degree murder is a viable offense, and if so the appropriate punishment. *Id.* at 1002-04. The California Supreme Court later granted review in *People v. Cortez*, 18 Cal. 4th 1223, 960 P.2d 537, 77 Cal. Rptr. 2d 733 (1998), "to determine whether the crime of conspiracy to commit murder is divisible into degrees with differing punishments, or whether all conspiracies to commit murder are conspiracies to commit first degree murder as a matter of law." *Cortez*, 960 P.2d at 539.

The California Supreme Court held in *Cortez* that conspiracy to commit murder is a unitary offense that is *punishable* in every instance for the penalty prescribed for first degree murder. 960 P.2d at 542. Within the context of a conspiracy it is incorrect to label the target offense of murder by any degree. Rather, as California Supreme Court Justice Stanley Mosk observed, the crime in question is "*murder simpliciter*" (i.e., simply "conspiracy to commit murder"). *Cortez*, 960 P.2d at 541, 548 (Mosk, J., concurring). The court concluded that all conspiracy to commit murder necessarily equates with and establishes the mental state of deliberate and premeditated first degree murder. *Id.* at 538, 546. The court

held,

> that where two or more persons conspire to commit murder – i.e., intend to agree or conspire, further intend to commit the target offense of murder, and perform one or more overt acts in furtherance of the planned murder – each has acted with the state of mind "functionally indistinguishable from the mental state of premeditating the target offense of murder." [Citation.] The mental state required for conviction of conspiracy to commit murder necessarily establishes premeditation and deliberation of the target offense of murder – hence all murder conspiracies are conspiracies to commit first degree murder, so to speak. More accurately stated, **conspiracy to commit murder is a unitary offense punishable in every instance in the same manner as is first degree murder** under the provisions of Penal Code section 182. [Citation.]

Cortez, 960 P.2d at 542 (emphasis added).[7/]

California's high court explained that, in granting Cortez's request for review, it asked the parties to address any error that may have arisen from the trial judge's failure to instruct the jury on premeditation and deliberation. *Id.* at 546. In answering this question, the court stressed that there is "no need for specific instruction on [the theories of] premeditation and deliberation respecting [a] conspiracy count." *Id.* Rather, all that is necessary is for the jury to be instructed with respect to the target offense that murder is "'the unlawful killing of a human being . . . with malice aforethought,' and with a definition of malice aforethought." *Id.* at p. 547. In order to find a defendant guilty of conspiracy to murder, a trier of fact

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7. Accordingly, Petitioner's repeated reference in his Petition to the crime as "conspiracy to commit first degree murder" is simply inaccurate.

must find both an agreement and an intent to kill.[8/] *Id.* at 542 Accordingly, if a jury was so instructed, and returned a verdict of guilty, the theory upon which the defendant was convicted is valid under California law. In this case, there is no dispute that the jury was so instructed.

Under *Cortez* a jury faced with a conspiracy to commit murder charge need not, and is not entitled to, make a determination as to whether the target crime was first or second degree murder. The fact that such a verdict was rendered in this case is irrelevant because, as instructed, the jury could only have found Petitioner guilty of "murder simpliciter," in that the jurors necessarily had to unanimously agree that Petitioner and his co-conspirator had the intent to agree and further intended to commit the murder which was the object of their agreement. Consequently, assuming agruendo that *Cortez* stated the law at the time of Petitioner's conviction,[9/] the elements of conspiracy

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8. Since the California Supreme Court's decision in *People v. Swain*, the standard jury instruction for conspiracy to murder provides, in pertinent part, that the following elements must be proved beyond a reasonable doubt:

> 1. Two or more persons entered into an agreement to kill unlawfully another human being;
>
> 2. [Each] [At least two] of the persons specifically intended to enter into an agreement with one or more other persons for that purpose;
>
> 3. [Each] [At least two] of the persons to the agreement harbored express malice aforethought, namely a specific intent to kill unlawfully another human being . . . .

CALJIC No. 8.69 (6th ed. 1996).

9. Contrary to Petitioner's assertions (Pet. at 7-9), it is not clear whether the rule announced in *Cortez* was the state of the law at the time of Petitioner's conviction. *See, e.g., People v. Horn*, 12 Cal. 3d 290, 298-300, 524 P.2d 1300, 1305-07, 115

to commit murder under California law were satisfied. Simply put, all the prosecution was required to prove was that Petitioner and Calley agreed to kill Hallin and further intended to commit the murder which was the object of their agreement.

> "'[Conspiracy to commit murder] does not require, as a factual matter, a premeditated and deliberate intent to kill unlawfully. But an intent of such character is present in the context of a conspiracy, practically by definition, because it does not arise of a sudden within a single person but is necessarily formed and then shared by at least two persons.'"

People v. Cortez, 960 P.2d at 542.

Petitioner nevertheless asserts that he was acquitted of a basic element of the charged offense, namely premeditation and deliberation, and thus could not have been convicted of conspiracy to murder. (Pet. at 7-12.) While it is true that Petitioner was "acquitted" of an offense imprecisely labeled "conspiracy to commit first degree murder," which included as an element of the target offense premeditation and deliberation, he was convicted of a conspiracy to murder offense which included the basic elements of an intent to agree and an intent to commit the target offense of murder. Such intents are "functionally indistinguishable from the mental state of premeditating the target offense of murder." *People v. Cortez*, 960 P.2d at 542 (internal quotation marks omitted). Since these intents were the functional equivalent of premeditation, the "acquittal" as to the one conspiracy to murder charge would not have precluded a conviction in the second conspiracy charge.

It is important to keep in mind the observations of the California Court of Appeal:

> The evidence of [Petitioner's] conduct on the night of his arrest shows that he was not merely present but was a key participant in the crime. He had driven Calley for four hours late at night looking

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Cal. Rptr. 516 (1974). Moreover, the California Supreme Court has never expressly resolved this question.

> for the address on Calley's note. He acknowledged that he knew Calley had a shotgun with him. Kleve himself had a loaded firearm in the cab of his truck. When Officer Garcia stopped the truck, [Petitioner and Calley] were only one to two blocks away from Hallin's home. The jury had more than sufficient evidence to find that [Petitioner] was an active conspirator in the plan to murder Mark Hallin.[10/]

Petitioner contends that because the first degree murder instruction provided in this case specifically defined premeditation, which he asserts more accurately described the requisite mental state, the "acquittal" as to that count would foreclose the second degree murder conspiracy conviction because premeditation was not specifically defined. (Pet. at 10-12.) However, the fact remains that the California Supreme Court has held that an agreement to kill is "functionally" the same thing as premeditation. Since the California Supreme Court has held that the same type of intent instruction given in this case with respect to the second degree murder conspiracy charge is sufficient to convict a defendant of the unitary offense of conspiracy to murder, the jury was not relieved of finding a basic element of the offense and no due process violation can be established. *Estelle v. McGuire*, 502 U.S. 62, 72 (1991); *Henderson v. Kibbe*, 431 U.S. 145, 154 (1977).

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10. The California Court of Appeal's opinion was provided to the Ninth Circuit Court of Appeals in Petitioner's Excerpts of Record.

II.

THE COURT OF APPEALS' RULING DOES NOT CONFLICTWITH THIS COURT'S *POWELL* DECISION

Citing *United States v. Powell*, 469 U.S. 57 (1984), the Court of Appeals concluded that Petitioner's "acquittal" with respect to the first degree murder conspiracy charge and his conviction on the second degree murder conspiracy charge may be seen has nothing more than "inconsistent verdicts." *Kleve*, 243 F.3d at 1149. Petitioner asserts that the Ninth Circuit "refused to follow" *Powell*. (Pet. at 12.) But his argument ultimately acknowledges that there is no conflict with *Powell*; his complaint is actually that he appellate court erred in "extending" *Powell*. (Pet. at 12-14.) Respondent disagrees. And, in any event, because a decision contrary to the Ninth Circuit's holding is not "dictated" by *Powell*, Petitioner's claim is barred by the anti-retroactivity principle established in *Teague v. Lane*, 489 U.S. 288 (1989).

Under *Teague*, federal habeas corpus relief is ordinarily unavailable if the claim is based on a "new rule" announced by the federal courts for the first time after finality of the Petitioner's state appeal. *Teague*, 489 U.S. at 301. The purpose of *Teague* is "to ensure that gradual developments in the law over which reasonable jurists may disagree are not later used to upset the finality of state convictions valid when entered." *Sawyer v. Smith*, 497 U.S. 227, 234 (1990). A habeas petitioner always has the burden of showing that the rule he seeks to invoke is not "new" within the meaning of *Teague*. *E.g., O'Dell v. Netherland*, 521 U.S. 151, 156 (1997).

As defined by *Teague* and its progeny, a "new rule" is one that "'breaks new ground,' 'imposes a new obligation on the States or the Federal Government,' or was not '*dictated* by precedent existing at the time the defendant's conviction became final.'" *E.g., O'Dell*, 521 U.S. at 156 (citations omitted and emphasis in original); *Teague*, 489 U.S. at 301. Thus, unless the result advocated by the habeas petitioner is actually *dictated*

or *compelled* by pre-existing precedent, his claim is a "new rule" claim within the meaning of *Teague*. Even if the result sought is arguably within the "logical compass" of a prior Supreme Court decision, it is not necessarily "dictated" by it within the meaning of *Teague*. *E.g., Butler v. McKellar*, 494 U.S. 407, 415 (1990). In fact, as long as reasonable courts might differ about the application of a rule to a particular situation, that application cannot be deemed to have been "dictated" by precedent. *O'Dell v. Netherland*, 521 U.S. at 160-64 & n.2; *Lambrix v. Singletary*, 520 U.S. 518, 527-39 (1997); *Greenawalt v. Ricketts*, 943 F.2d 1020, 1024-25 (9th Cir. 1991).

"[W]here truly inconsistent verdicts have been reached, '[t]he most that can be said . . . is that the verdict shows that either in the acquittal or the conviction the jury did not speak their real conclusions, but that does not show that they were not convinced of the defendant's guilt.'" *Powell*, 469 U.S. at 64-65; *see United States v. Price*, 750 F.2d 363, 365 (5th Cir. 1985). It is "possible that the jury, convinced of guilt, properly reached its conclusion on the compound offense, and then through mistake, compromise, or lenity, arrived at an inconsistent conclusion on the lesser offense." *Powell*, 469 U.S. at 65; *see United States v. Price*, 750 F.2d at 365. Nothing in the federal Constitution protects an accused against inconsistent verdicts. *Powell*, 469 U.S. at 65.

Petitioner has not identified any authority which "*compels*" or "*dictates*" a different result here. Because the jury was instructed on both counts as to the elements of the target offense (either one of which was sufficient to sustain a finding as to the target crime in a conspiracy murder) and the necessary mental state of an agreement to kill (which is the functional equivalent of premeditation), at most, the jury's findings with respect to the "lesser" conspiracy count was simply inconsistent with its decision as to the greater count. In other words, an "acquittal" on the first degree murder theory did not necessarily preclude a conviction using the second degree murder theory instructions because the elements with respect to the conspiracy's target offense are identical, i.e., an intent to kill,

and the mental state relating to the agreement to kill is functionally the same thing as premeditation. The jury's finding with respect to the degree of the intended murder was simply superfluous, and the acquittal on the first degree murder theory did not preclude the jury from finding beyond a reasonable doubt that Petitioner had the requisite mental state to commit murder and had agreed to do so.

Petitioner was clearly guilty of conspiracy to commit murder. Yet, he received the windfall of a second degree murder sentence – 15 years to life – instead of the prescribed 25 years to life for conspiracy to commit murder.

> Given the state of the record in this case, [where Petitioner joined the conspiracy relatively late,] the second degree verdict had to be the product, not of erroneous instructions or prejudicial confusion on the part of the jury, but rather of an attempt by the jury to show unwarranted leniency.

People v. Underwood, 181 Cal. App. 3d 1223, 1237, 226 Cal. Rptr. 840 (1986). Petitioner has already received the benefit of jury leniency not supported by the evidence, and he is in no position to seek outright reversal. *Id.*; *see also People v. Amick*, 20 Cal. 2d 247, 252, 125 P.2d 25 (1942) ("[I]nconsistent verdicts may be caused not by the confusion but the mercy of the jury, of which the [defendant] can neither complain nor gain further advantage.").

Additionally, the Court of Appeals was correct in noting that the verdicts may also be viewed as consistent,

> for *Cortez* may be read not as holding that two kinds of conspiracy are identical, but, rather that they are merely functional equivalents for purposes of punishment.

Kleve, 243 F.3d at 1151. The Court of Appeals' decision is consistent with the *Cortez* court's pronouncement that conspiracy to commit murder is not a matter of degree, but rather, it may be treated for purposes of *punishment* as the equivalent of conspiracy to commit first degree murder, since the agreement component of the conspiracy is the same as

premeditation and deliberation. Under this reading of *Cortez*, Petitioner's crime was not actual conspiracy to commit first degree murder, but rather its functional equivalent. In the words of the California Supreme Court, it was conspiracy to commit first degree murder, "so to speak." *Cortez*, 960 P.2d at 542.

III.

THERE IS NO CONFLICT AMONG CIRCUIT AUTHORITY

Finally, Petitioner claims that the Ninth Circuit's decision in this case put it at conflict with the Fifth and Eleventh Circuits. (Pet. at14-16.) There is no conflict. And, because precedent does not "dictate" relief under the *Teague* doctrine, this Court would not reach the merits to resolve the conflict even if it did exist. *See Penry v. Lynaugh* (1989) 492 U.S. 302, 313-15.

Petitioner relies on *Adams v. Murphy*, 653 F.2d 224 (5th Cir. 1981), as the basis for this assertion of a conflict. (Pet. at 15.) In *Adams*, the habeas corpus petitioner had been tried in a Florida state court for testifying falsely to a state grand jury. At the close of evidence in the state trial, the defense requested an instruction on "attempted perjury" as a lesser included offense, and the trial court instructed the jury both on perjury and attempted perjury, even though there was no such offense as attempted perjury under Florida law. The jury returned a verdict of guilty on the "lesser" offense of attempted perjury. Adams unsuccessfully challenged his conviction in Florida state courts and then sought habeas relief in the United States District Court, which concluded that no such offense as attempted perjury existed under Florida law and granted the writ on due process grounds. *Adams*, 653 F.2d at 224. On appeal, the Fifth Circuit affirmed, stating, "Nowhere in this country can any man be condemned for a non-existent crime." *Id.* at 225.

Here, it could be concluded that the trial court erroneously instructed on both first and second degree murder when describing the target offense of the conspiracy, believing that conspiracy to commit second degree murder was a lesser included offense. Any error, however, was of no moment because the necessary elements of the crime are identical under either a theory of first degree or second degree express-malice murder. In other words, to have convicted Petitioner of the unitary offense of conspiracy to murder, the jury had to have

found that express-malice (i.e., intent-to-kill) existed along with an agreement between Petitioner and Calley to carry out that crime. As discussed *ante*, these elements existed under either theory of the instructions relating to the target crime.

By contrast, the "attempted perjury" in *Adams* was truly a non-existent crime. In other words, the crime was not the "equivalent" of perjury itself. Here, however, Petitioner was convicted of a crime which, although "nonexistent" in name, in all elements comprised the main offense. The Ninth Circuit's decision did not conflict with *Adams*' holding that one cannot be convicted of a non-existent crime. Rather, the Ninth Circuit held that one can be convicted of a crime which does exist, even if it is mislabeled. Petitioner's argument thus appears to be an alleged misapplication of settled law, rather than an actual conflict between the Circuit Courts of Appeals.

CONCLUSION

Accordingly, based on the manner in which the jury was instructed, Petitioner was properly convicted under a viable legal theory of conspiracy to commit murder, and his Petition for Writ of Certiorari should be denied.

Dated: July 13, 2001

Respectfully submitted,

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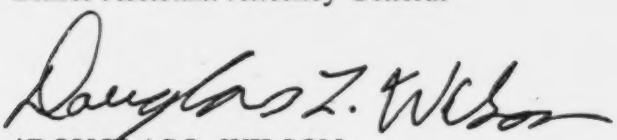

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